## CONTENTS.



## AUTHORITIES CITED.

# In the Supreme Court of the United States.

OCTOBER TERM, 1922.

LOUIS KLEBE AND JULES KLEBE, Co-partners, trading as L. Klebe & Company, appellants,
*v.*
THE UNITED STATES. } No. 482.

*APPEAL FROM THE COURT OF CLAIMS.*

## BRIEF FOR THE UNITED STATES.

### STATEMENT OF THE CASE.

This is an appeal from a decision of the Court of Claims holding that the plaintiffs could not recover from the United States on the basis that the United States had requisitioned the plaintiffs' steam shovel and had thereby impliedly agreed to pay the plaintiffs the fair value of their shovel. The United States, claiming that it had taken the plaintiffs' shovel through the exercise of a contract right which it had to purchase the same, admitted that $775 was due the plaintiffs on account of the purchase price of the shovel, and the court entered judgment for this amount.

On April 26, 1918, the United States entered into a cost-plus contract with the Bates & Rogers Construction Company for the construction by this company

of a quartermaster interior storage depot at New Cumberland, Pennsylvania. (R. 12.)

In Article II of this contract the United States agreed to reimburse the contractor for certain enumerated items of expenditure. By paragraph (c) of Article II, the United States was to reimburse the contractor for "rentals actually paid" by the contractor for construction equipment used in the work, including steam shovels, at rates not in excess of an annexed schedule of rental rates. By paragraph (c) the contractor was also to be paid rental at the rates mentioned in the attached schedule of rental rates for equipment which the contractor "may own and furnish" for use in the work. The contractor was required to file with the contracting officer of the United States a schedule of the fair valuation of all equipment upon its arrival at the site, and these valuations were to be deemed final unless seasonable objection was made by the contracting officer. (R. 20.) Paragraph (c) further provided:

> When and if the total rental paid to the Contractor for any such shall equal the valuation thereof, no further rental shall be paid to the Contractor, and title thereto shall vest in the United States. At the completion of the work, the Constructing Officer may at his option purchase for the United States any part of such construction plant then owned by the Contractor by paying to the Contractor the difference between the valuation of such part or parts and the total rental theretofore paid therefor. (R. 20.)

In May, 1918, the plaintiffs agreed to lease to the Bates & Rogers Construction Company an Erie Traction Steam Shovel, No. 74, for use in the construction work at New Cumberland, Pennsylvania, at a rental of $25 per day. The plaintiffs delivered such shovel there on May 18, 1918. (R. 12.) On June 3, 1918, Bates & Rogers forwarded to the plaintiffs a lease for the use of their steam shovel, and this lease was subsequently executed by both parties. (R. 13.) In Section 9 of the lease the plaintiffs, lessor, certified and declared the value of the steam shovel to be $5,000. (R. 9.) Section 8 of the lease reads as follows:

> The Lessor has made himself acquainted with the provisions of Article II of said Contract of ——— ———, 1918, between the party of the second part hereto and the United States Government, and expressly agrees that all of the provisions of paragraph (c) of said Article II, shall apply to and be enforceable against the said equipment furnished and leased hereunder, to the end that the United States Government may have and exercise as to and against the said equipment all rights provided for in said paragraph (c), with respect to plant or parts thereof owned and furnished by the party of the second part hereto, the Lessor to be entitled, as owner, to receive any purchase price payments which upon any appropriation of said equipment by the United States Government, under said Article II, may be coming from said Government. (R. 9.)

A copy of paragraph (c) of Article II of the contract between the Bates & Rogers Construction Company and the United States was physically annexed to the lease entered into between the plaintiffs and the construction company. (R. 13, 10.)

The plaintiffs' steam shovel was used at New Cumberland from May 18, 1918, to November 2, 1918, inclusive. Rental for this period at $25 per day, amounting to $4,225, was paid by the United States to the Bates & Rogers Construction Company and in turn paid by that company to the plaintiffs. (R. 14.)

The Court of Claims found as a fact that the plaintiffs' steam shovel was appropriated by the Government as its property under the purchase privilege clause of the contract between the plaintiffs and the Bates & Rogers Construction Company. (Finding VIII, R. 14.) On November 2, 1918, the shovel was shipped by the Government to Mays Landing, New Jersey, to be used there in other Government work. (R. 18.) The circumstances of this appropriation were as follows:

On October 2, 1918, the contractor, the Bates & Rogers Construction Company, notified the Government constructing officer at New Cumberland that the work on which the plaintiffs' shovel was being used was nearing completion and that at such a time the shovel would have earned approximately $3,825, and inquired "whether it was the intention of the Government to exercise its purchase privilege." (R. 15.)

The Government constructing officer forwarded the above notification to the War Department at Washington with the indorsement, "It is recommended that this shovel be taken over by the Government if there is Government work to which it can be assigned." This recommendation was approved by the War Department on October 14, 1918. (R. 15.) The constructing officer then notified the contractor that, "acting upon instructions from Washington, we hereby exercise the Government's purchase privilege and take over said Erie steam shovel B–74 as the property of the United States." The contractor was further notified that directions had been given to ship the shovel to the officer in charge of construction at Mays Landing, N. J., "to whom you will invoice the shovel, charging the difference between the agreed valuation and the accrued rental at the date of transfer." (R. 15.)

The contractor on October 28 notified the plaintiffs of this action. On November 5 the plaintiffs replied to the contractor that they did not recognize any right of the Government to appropriate their shovel "upon payment of an agreed valuation less earned rentals," and that "our contract with you was not made subject to the terms of any contract you had with the Government." (R. 16.)

The foregoing letter was brought to the attention of the Government constructing officer, who wrote the plaintiffs on November 6, 1918, that "the Government has taken over your shovel No. 74 as distinctly provided in the contract." Plaintiffs were advised

to present any claim they had to the contrary to the War Department at Washington. (R. 16 and 17.)

The work of constructing the interior storage depot at New Cumberland was completed early in December, 1918. The class of work on which the steam shovels were used was completed subsequent to November 6, 1918, on which date about 95 per cent of the excavating work had been done. (R. 18.)

The fair value of the plaintiffs' shovel at the time it was taken by the United States was $5,000. (R. 18.)

The United States has at all times been ready and willing to pay the plaintiffs the sum of $775 pursuant to the rights which it asserts under the contract between the plaintiffs and the Bates and Rogers Construction Company. (R. 18.)

## ARGUMENT.

### I.

### The United States did not enter into an implied contract to pay the fair value of the shovel.

A. *The officers taking the shovel had no statutory authority to appropriate it on behalf of the United States.*

The present suit was brought in the Court of Claims, which has jurisdiction of claims against the United States based upon contracts express or implied. The plaintiffs do not rely upon an express contract with the United States, but contend that an implied contract to pay the fair value of their shovel arose by reason of the taking of their shovel.

When an officer of the United States duly authorized by Act of Congress to appropriate property takes property for the public use without asserting on behalf of the United States any right in the property, the courts imply a contract between the United States and the owner that the former will pay the fair value of the property taken. *United States* v. *Lynah*, 188 U. S. 445, 462; *United States* v. *Great Falls Manufacturing Company*, 112 U. S. 645.

The United States, however, is not bound by unauthorized acts of its officers. If no act of Congress authorizes appropriation for the public use of a given kind of property, its use by a Government officer will be a tortious act. For such a tortious act there can be no recovery against the United States upon a contractual basis. (*Hooe* v. *United States*, 218 U. S. 322.)

Even where Congress has authorized appropriation of private property for the public use, the United States will not be bound in contract to pay the fair value of such property unless it is established that the property was taken by or through the particular officer upon whom Congress conferred the power of appropriation. In *United States* v. *North American Trading Company*, 253 U. S. 330, this Court held that although Congress had empowered the Secretary of War to take land for barracks and quarters for troops, the action of the general commanding the Department of Alaska in taking land for these purposes did not give rise to an implied con-

tract upon which the United States could be sued, since the Secretary of War had not authorized this officer to act in his behalf in taking the land. The court said (p. 333):

> In order that the Government shall be liable it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power.

In the present case no Act of Congress authorized the appropriation of the plaintiffs' shovel for the public use. The only Act of Congress which might seem to give color of authority for such taking is Section 120 of the National Defense Act of June 3, 1916 (39 Stat. 213). By this section the President in time of war is empowered through the head of any Department of the Government to place an order with any individual or firm for such product or material as may be required, and which is of the nature and kind usually produced by such individual or firm. Compliance with all such orders for products or materials is made obligatory and given precedence over all other orders or contracts previously placed with such individual or firm. The section further authorizes the President to take possession of and to operate any plant capable of producing war supplies which has refused to carry out orders for war supplies placed with it by the Secretary of War.

Section 120 has no application to the present case, since the United States did not place an order with

the plaintiffs for their steam shovel, but rather directly took possession of their shovel. The authority given by Section 120 to place compulsory orders for the production or delivery of products or materials does not give authority to make a direct appropriation of private property for the public use. The section recognizes the distinction between these two kinds of authority by providing that when orders for necessary war supplies are not complied with the President may then take possession of and operate the manufacturing plant which has refused production.

Even if Section 120 of the National Defense Act be construed to give authority to appropriate the plaintiffs' shovel, the plaintiffs can not recover in the present case because they have not shown that the officers who physically took possession of their property were authorized so to do "by the official upon whom Congress conferred the power." The authority given in Section 120 is to the President, acting through the heads of the Departments. The Court of Claims has made no finding that the officers who physically took possession of the plaintiffs' shovel had received authority from the Secretary of War to act for him in appropriating plaintiffs' shovel under Section 120. If such authority is not established, the plaintiffs can not recover from the United States on the basis of an implied contract to pay the fair value of their shovel. (*North American Trading Company* v. *United States, supra.*)

B. *The officers taking the shovel asserted contract rights inconsistent with an implied promise to pay its fair value.*

When property is taken pursuant to an Act of Congress and no claim to a right in the property is asserted on behalf of the Government at the time of the taking, the law implies a promise by the United States to pay just compensation. When this implied promise has once been made, a later denial of liability by the Government does not destroy the implied contract which has arisen.

No such promise can be implied when at the time of the taking the Government asserts that it takes pursuant to a property right in the thing taken or pursuant to contract rights therein. It is immaterial in this connection whether or not the claim of the Government is well founded. The assertion of the right makes it impossible to imply that the Government promises to pay compensation as for property appropriated for the public use, since such a promise is to be implied only from the circumstance that the Government in taking the property has tacitly admitted that it has no right thereto except such as it may obtain by the exercise of its power of appropriation.

In *Tempel* v. *United States*, 248 U. S. 121, the United States dredged certain submerged lands for the improvement of navigation on the Chicago River. The United States did this work without knowing that the lands had become submerged through certain private excavations previously made without

the consent of the owners of the lands. Suit to recover the value of the lands thus taken was brought in the United States District Court, sitting as a Court of Claims. This court held that since the United States took the lands in the belief that they lay under a navigable river and that they could therefore be taken for the improvement of navigation without payment of just compensation, no promise to pay compensation for these lands could be implied and no suit ex contractu could be brought against the United States. The court also specifically held in this case that it was unnecessary to determine whether or not the property rights asserted by the United States at the time of the taking were valid.

In *Tempel* v. *United States, supra*, the United States did not claim fee to the lands which it used in its work of improving navigation. The opinion of the court states (p. 129) that under the law of Illinois neither the United States nor the State owns the lands under a navigable river, but that riparian owners own the fee to the middle of the stream. The case therefore holds that although the United States does not claim ownership of the property taken, nevertheless if the United States at the time of taking makes claim to a right which is inconsistent with a promise to pay the owner just compensation, no implied promise to pay such compensation arises and no suit ex contractu can be brought against the United States.

In the present case the United States asserted that it took the plaintiffs' shovel pursuant to a contract

right to purchase it for $5,000, less the amount of rentals paid for the use of the machine. The Court of Claims found as a fact that the plaintiffs' shovel "was appropriated by the Government as its property under the purchase privilege clause of the contract between the plaintiffs and the Bates & Rogers Construction Company." (Finding VIII, R. 14.) The correspondence set forth in the findings of the Court of Claims fully substantiates the foregoing conclusion of fact reached by the court. To say that the United States in taking the plaintiffs' shovel impliedly promised to pay its fair value irrespective of prior rental payments is in direct conflict with the express assertions made at the time of the taking by the officers acting for the United States in this matter.

The opinion of the Court of Claims states the case as follows (R. 32):

> To claim that by the very act of exercising this asserted right to purchase for $775 the Government made itself liable, upon an implied contract, to pay $5,000, involves a contradiction of terms. It ignores any distinction between express and implied agreements, and confuses that class of contracts which grow out of the dealings of parties with the distinct class of implied contracts arising from the exercise of the sovereign right of eminent domain because of the Fifth Amendment.

*Hawkins* v. *United States*, 96 U. S. 689, shows that where parties act under an express contract the courts will not imply a promise by one of the parties with respect to matters covered by the express contract.

In the Hawkins case the claimant contracted to deliver to the United States certain rubblestone for the construction of a public building. The claimant, pursuant to the demand of the assistant superintendent of the work, delivered more expensive stone than that called for by his contract. He sued to recover the fair price of the stone delivered, but this court held him entitled only to the contract price. It said, page 697:

> Express stipulations can not in general be set aside or varied by implied promises; or, in other words, a promise is not implied where there is an express written contract, unless the express contract has been rescinded or abandoned, or has been varied by the consent of the parties.

In the present case the United States asserted that it acted pursuant to a contract right to purchase plaintiffs' shovel. Under the doctrine of the Hawkins case no promise inconsistent with the rights asserted under an express contract can be implied. The promise to pay just compensation for private property is implied only when the United States purported to appropriate property for the public use. The basis for such an implication is lacking when, as in the present case, the United States expressly denies that it is appropriating property in the exercise of the right of eminent domain.

This court has denied contractual liability by the United States under circumstances more favorable to the claimant than those existing in the present

case. In *Horstmann Company* v. *United States*, 257 U. S. 138, the claimants sued in the Court of Claims to recover compensation for the flooding of their soda lakes. This Court assumed that a Government irrigation project had caused the flooding, but held that since this result could not reasonably have been foreseen when the work was commenced there was no basis for implying a promise by the Government to pay compensation for the injured property. The Court said, page 146:

> It is to be remembered that to bind the Government there must be implication of a contract to pay, but the circumstances may rebut that implication.

Since the court has denied a promise to pay just compensation where there is merely circumstantial evidence against the implication of such a promise, there is the greater reason in the present case to deny any promise to pay just compensation when at the time of the taking rights were asserted which were inconsistent with any promise to pay just compensation for the property taken and used in the public service.

II.

**The United States acquired the shovel pursuant to a valid contractual right of purchase.**

The United States purchased the plaintiff's shovel under Section 8 of the contract between the plaintiffs and the Bates & Rogers Construction Company. Paragraph (c) of Article II of the contract between the United States and the Bates & Rogers Construc-

tion Company gave the United States the option to purchase "any part of such construction plant then owned by the Contractor." Section 8 of the contract between the plaintiffs and the construction company subjects the plaintiffs' shovel to the provisions of paragraph (c) of Article II of the earlier contract "to the end that the United States Government may have and exercise as to and against the said equipment all rights provided for in said paragraph (c), * * * the Lessor to be entitled, as owner, to receive any purchase-price payments which upon appropriation of said equipment by the United States Government, under said Article II, may be coming from said Government."

Section 8 gives the United States the option of purchasing the plaintiffs' shovel upon the same terms that it may, under paragraph (c) of Article II of the earlier contract, exercise an option of purchasing equipment owned by the Bates & Rogers Construction Company and used on the construction work. To contend that Section 8 gave an option of purchase only with respect to equipment owned by the Bates & Rogers Construction Company is to render Section 8 void and meaningless.

The plaintiffs have contended that the contract between the plaintiffs and the Bates & Rogers Construction Company must be interpreted by the law of Pennsylvania, and that by the law of that State a third party beneficiary can not enforce rights given him by a contract to which he is not a party. (Appellants' Brief, pp. 21 to 28.)

While the Pennsylvania courts have stated that third-party beneficiaries can not sue to enforce their rights, numerous exceptions to the general rule have been recognized. Page on Contracts, 2nd Ed., Sec. 2385, states:

> In Pennsylvania the general rule seems to be that the beneficiary can not maintain an action upon a contract for his benefit. Such a rule is, however, subject to a number of exceptions * * *. It is said that a beneficiary can sue if a release would operate as a discharge of the promisor, but not if it would leave the promisor liable to the promisee.

In *Kountz* v. *Holthouse*, 85 Pa. 235, 237, the court said:

> Yet many cases are to be found in which the right of a third person to sue has been sustained on a promise made to another. * * * This right of action is not restricted in cases of money only; but extends to an agreement to deliver over any valuable thing, so that such third person is the only party in interest.

A leading Pennsylvania case in which a third party beneficiary was allowed to recover is *McBride, Administratrix*, v. *Western Pennsylvania Paper Company*, 263 Pa. 345. The facts in that case were that Bowman held a judgment against McBride and execution against certain land owned by McBride had issued on the judgment. Bowman refused to sell the judgment to the defendant unless it agreed to pay to McBride half the net profit which might

be realized on a resale of the land. This agreement was made and the court allowed McBride's Administratrix to recover from the defendant half the net profit realized on a resale of the land. It said, page 349:

> Though no consideration moved from McBride or his family, as beneficiaries under the contract they were entitled to maintain an action thereon.

It appears that under Pennsylvania law a third party beneficiary can sue if he is the only party in interest so that his release will discharge the promisor from the obligation in question. The plaintiffs contend (Appellants' Brief, pp. 32, 33) that this exception is not applicable to the present case, since the United States could not discharge the plaintiffs from their obligations under the contract made between the plaintiffs and the Bates & Rogers Construction Company.

The obligations of Section 8 are separable from the body of the obligations of the contract of which it is a part. The test of the Pennsylvania court as to the rights of third party beneficiaries should be applied, not to the entire obligations of the contract, but to the separable obligations of Section 8. As to Section 8 the United States and the plaintiffs are the only parties in interest and a release by the United States would dicharge the plaintiffs from the obligations of that section. The option of purchase given the United States by Section 8 is therefore valid under the law of Pennsylvania, and the United States

acquired the plaintiffs' shovel by exercise of the option of purchase given by that section.

The judgment of the Court of Claims in favor of the plaintiffs for the sum of $775 should be affirmed.

Respectfully submitted.

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APRIL, 1923.

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